

The Validity of the Two-Member NLRB

Kelli Ann Kleisinger[†] & Richard A. Bales^{††}

I. Introduction	260
II. Background	262
A. The Wagner Act and the Self-Enforcing NLRB	262
B. Problems with the Wagner Act	263
C. The Current NLRB	264
D. The Two-Member Board	265
E. The OLC Opinion	266
F. Quorums under a Five-Member Board	267
III. Split of Authority	270
A. Two-member NLRB may validly exercise its power under Section 3(b) of the NLRA	270
B. Two-member NLRB lacks the power to issue decisions under Section 3(b) of the NLRA	276
IV. Analysis and Proposal	278
A. Arguments Defending the Two-Member Board	278
A. Arguments for Invalidating the Two-Member Board	283
C. Proposal	285
V. Conclusion	286

I. INTRODUCTION

Beginning December 31, 2007, the membership of the National Labor Relations Board (“the Board”) dropped to two members.¹ Shortly

[†] J.D. Northern Kentucky University, Salmon P. Chase College of Law, anticipated May 2011.

^{††} Professor of Law and Director, Center for Excellence in Advocacy, Northern Kentucky University, Salmon P. Chase College of Law.

¹ David J. Murphy, *The “New” Obama National Labor Relations Board: Attack, Retreat, or Both?*, in EMPLOYMENT LITIGATION 2009, at 267, 263-94 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18618, 2009).

beforehand, with four members left, the Board delegated all of its power to a three-member panel.² When the terms of two of the four remaining members expired shortly after, the Board was left with two members: Wilma Liebman, a Democrat, and Peter Schaumber, a Republican.³ Liebman and Schaumber continued to adjudicate cases, assuming that two members constituted a quorum of any panel of the Board; that is, Liebman and Schaumber constituted a quorum of the three-member panel to which the Board delegated its power.⁴

For more than two years, the NLRB was comprised of only these two members. This changed in March 2010, when President Barack Obama made recess-appointed Craig Becker and Mark Pearce to the Board, thus raising Board membership to four.⁵ The Board, while comprised of two members, issued more than 500 decisions.⁶ The validity of those decisions is at issue given Section 3(b) of the NLRA which requires that the Board have, “at all times,” a quorum of three.⁷

Six circuits have addressed the issue. The First, Second, Fourth, Seventh, and Tenth Circuits have held that the two-member Board constitutes a quorum of the three-member panel, even though the Board at the time of the decision lacked a quorum of three.⁸ On the other hand, the D.C. Circuit has held that the two-member Board is invalid because, when the Board lost its quorum, the Board could no longer function.⁹ Due to the significance of the issue to labor disputes, the Supreme Court has granted certiorari in *New Process Steel, L.P. v. NLRB*.¹⁰

² Kenneth Dolin, *D.C. Circuit Says Two-Member NLRB Lacks Authority But the Recent Decision Differs with Three Other Appellate Courts that Addressed the Issue*, 31 NAT'L L.J. 12 (2009).

³ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 471 (D.C. Cir. 2009).

⁴ See Dolin, *supra* note 2, at 12.

⁵ See White House Press Release, President Obama Announces Recess Appointments to Key Administration Positions (March 27, 2010), at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions> (last accessed May 4, 2010).

⁶ Wilma Liebman, NLRB Press Release (February 5, 2010), http://www.nlr.gov/shared_files/Press%20Releases/2010/R-2725.pdf (last accessed May 4, 2010) (noting that the two-member Board has issued more than 500 cases).

⁷ 29 U.S.C. Section 153(b) (2009).

⁸ See generally, *Northeastern Land Services, LTD v. NLRB*, 560 F.3d 36 (1st Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); and *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009).

⁹ *Laurel Baye Healthcare v. NLRB*, 564 F.3d 469.

¹⁰ 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S. Ct. 488 (2009).

This article argues that the decisions of a two-member Board are invalid, but that the decisions may be rehabilitated once the President nominates, and the Senate approves, additional members. Part II describes the history of the Board and the NLRA as well as the current requirements of the Board. Part III details the arguments of the differing circuits when addressing whether a two-member Board is valid. Part IV analyzes arguments on either side of the issue and concludes that the statutory integrity of the NLRA should be upheld despite the inconvenience of invalidating more than 300 cases.

II. BACKGROUND

A. The Wagner Act and the Self-Enforcing NLRB

Unfair employment practices and a rise in unemployment during the Great Depression precipitated a fight for fair employment and the rights of employees. In response, Congress made several innovative, but unsuccessful, attempts to protect employee rights.¹¹ Finally, in 1935, Congress successfully enacted the Wagner Act.¹² Through this statute, Senator Robert F. Wagner, the main proponent of the Act, sought to give workers power by joining them with their fellow workers.¹³ Although past statutes had also sought to unite workers, the Wagner Act safeguarded employees' rights with more vigor than its forerunners.¹⁴

The Wagner Act established an administrative three-member board appointed by the President.¹⁵ The members were to have staggered, five-year terms.¹⁶ Unlike previous Boards, the Wagner Act provided the three-member Board with the means to enforce its decisions through subpoena powers, the ability to make findings of fact and issue cease-and-desist orders, and the power to order affirmative remedies for violations of the Wagner Act.¹⁷ Furthermore, the Wagner Act supported these powers with the right to seek judicial enforcement of Board

¹¹ NLRA, THE FIRST SIXTY YEARS 5 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

¹² TIMOTHY J. HEINSZ, DENNIS R. NOLAN & RICHARD A. BALES, LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 109 (6th ed. 2009).

¹³ *Id.* at 111.

¹⁴ NLRA, THE FIRST SIXTY YEARS 10 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

¹⁵ National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 451 (1935) (codified as amended at 29 U.S.C. 153 (2006)).

¹⁶ *Id.*

¹⁷ National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 454–56 (1935) (codified as amended at 29 U.S.C. 160 (2006)).

orders.¹⁸ Such enforcement powers were lacking in previous boards established by labor statutes, and the presence of enforcement tools made the Wagner Act and the Board's decisions harder for employers to ignore.¹⁹

B. Problems with the Wagner Act

Although its more conservative predecessors had fallen to constitutional attacks, the Wagner Act and its powerful new Board survived such constitutional criticism.²⁰ Proponents of the Wagner Act and similar efforts argued that the Act was constitutional because "employer interference with the right of workers to organize into unions and the refusal of employers to bargain collectively led to labor disputes;"²¹ labor disputes, in turn, interfered with interstate commerce.²² This time the argument succeeded.²³

Despite overcoming constitutional criticism, the Wagner Act could not withstand attacks from both employers and labor unions.²⁴ The employers accused the Board of having a "pro-labor bias."²⁵ On the other hand, the tension between craft and industrial unions caused the unions to turn against the Board as well; the craft unions accused the Board of being pro-industrial unions, and the industrial unions attacked the Board for being pro-craft unions.²⁶

After World War II, antagonism for the Board grew when unemployment levels again skyrocketed.²⁷ Congress answered the unemployment crisis by freezing many collective bargaining agreements created during the war.²⁸ In response, employees used tools provided by the Wagner Act to strike against their ineffective collective bargaining agreements.²⁹ Consequently, by 1947, the public turned against unions,

¹⁸ *Id.*

¹⁹ NLRA, THE FIRST SIXTY YEARS 10 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

²⁴ NLRA, THE FIRST SIXTY YEARS 16 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

²⁵ *Id.*

²⁶ *Id.*

²⁷ NLRA, THE FIRST SIXTY YEARS 19 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

²⁸ *Id.*

²⁹ *Id.*

no longer viewing unions as the “underdog[s], but rather [viewing them] as having too much economic and political power.”³⁰

C. *The Current NLRB*

Congress remedied the growing public animosity toward the NLRA by enacting the Taft-Hartley Act of 1947.³¹ The Taft-Hartley Act amendments brought about two dramatic changes in the structure and operation of the Board. First, the amendments increased the number of Board members. Previously, the NLRB had been composed of three members.³² The 1947 amendments modified the NLRA to require five members.³³ The appointment requirements, however, remained the same. The five members were, and still are, to be “appointed by the President by and with the advice and consent of the Senate.”³⁴ Although the Taft-Hartley Act itself made no additional requirements of the Board members, it has been tradition that “no more than three Board Members are from the same political party.”³⁵

Second, the 1947 Amendments changed the “role” of the Board. Under the Wagner Act, the Board had performed the role of judge as well as prosecutor.³⁶ To remedy the potential prejudice that could come from this dual role, the Taft-Hartley Act created a General Counsel to act as a prosecutor and supervisor of the NLRA.³⁷ The General Counsel and the Board were to act separately in the discharge of their responsibilities, meaning that the Board no longer participated in the preliminary investigations of claims.³⁸ To further increase efficiency, “the Board devised a system by which most of its cases could be decided by five

³⁰ *Id.*

³¹ National Labor Relations (Taft-Hartley) Act, ch. 120, 49 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-67 (2006)).

³² National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 454-56 (1935) (codified as amended at 29 U.S.C. 160 (2006)); *see also* TIMOTHY J. HEINSZ, DENNIS R. NOLAN & RICHARD A. BALES, *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 150 (6th ed. 2009).

³³ National Labor Relations (Taft-Hartley) Act, ch. 120, 49 Stat. 139 (1947) (codified as amended at 29 U.S.C. §§ 151-67 (2006)).

³⁴ *Id.*

³⁵ David J. Murphy, *The “New” Obama National Labor Relations Board: Attack, Retreat, or Both?*, in *EMPLOYMENT LITIGATION* 2009, at 267, 263-94 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18618, 2009).

³⁶ National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 451-55 (1935) (codified as amended at 29 U.S.C. 160 (2006)).

³⁷ 29 U.S.C. § 153(d) (2006); *see also* NLRA, *THE FIRST SIXTY YEARS* 22 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

³⁸ NLRA, *THE FIRST SIXTY YEARS* 26 (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

panels of three members,” but the entire Board decided issues of unresolved policy or law.³⁹

In addition to these changes, the Taft-Hartley amendments also specified how a quorum of the Board was to be determined. The amended Section 3(b) of the NLRA states that the Board may:

delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.⁴⁰

These two sentences form the basis of the issue of whether a two-member Board is permissible.

D. The Two-Member Board

Until recently, the Board has stayed true to the three-member panel system and issued decisions through three-member panels, except in rare circumstances.⁴¹ However, beginning in December 31, 2007, the Board has been constituted by only two members “both for political reasons and presumably President Bush’s general disregard for the NLRB”⁴²

On December 16, 2007, the Board lost its first of five members when Chairman Robert J. Battista’s term expired.⁴³ The terms of two of the remaining four members, Peter Kirsanow and Dennis P. Walsh, were set to expire on December 31, 2007.⁴⁴ With expiration of two out of four members’ terms looming and no hope of new Board nominees on the horizon, the remaining four members delegated their powers to a three-member panel, effective December 28, 2007.⁴⁵ Based on the Board’s own analysis and that of the Office of Legal Counsel (OLC), the two remaining members concluded that the delegation to a three-member board would allow them to continue to issue decisions as long as the

³⁹ *Id.*; see also National Labor Relations (Taft-Hartley) Act, ch. 120, 49 Stat. 139 (1947) (codified as amended at 29 U.S.C. §§ 151-67 (2006)).

⁴⁰ 29 U.S.C. § 153(b).

⁴¹ 11 EMPLOYMENT COORDINATOR LABOR RELATIONS *Board Members* § 41:5 (2009).

⁴² David J. Murphy, *The “New” Obama National Labor Relations Board: Attack, Retreat, or Both?*, in EMPLOYMENT LITIGATION 2009, at 267, 263-94 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18618, 2009).

⁴³ Kenneth Dolin, *D.C. Circuit Says Two-Member NLRB Lacks Authority But the Recent Decision Differs with Three Other Appellate Courts that Addressed the Issue*, 31 NAT’L L.J. 12 (2009).

⁴⁴ *Id.*

⁴⁵ *Id.*

“two remaining members [were] . . . part of the three-member group to which the Board delegated all of its powers”⁴⁶ When Kirsanow and Walsh’s terms expired on December 31, 2007, Chair Wilma Liebman (Democrat) and Peter Schaumber (Republican) were all that remained of the NLRB.⁴⁷

E. The OLC Opinion

On May 16, 2002, the Board requested an opinion from the OLC on whether, having delegated all of its powers to a group of three members, the . . . Board may issue decisions and orders in unfair labor practice and representation cases once three of the five seats on the Board have become vacant.”⁴⁸ The OLC issued its opinion on March 4, 2003, holding that a two-member Board is valid if the two members were “part of the three-member group to which delegated all of its powers and if they both participate in such decisions and orders.”⁴⁹

The OLC opinion notes that in the past, when Board membership has fallen to two members, the Board has ceased to issue decisions and orders.⁵⁰ However, the OLC opinion suggests that this does not have to be the case, as long as the Board delegated all of its powers to a group of three members before the membership fell to two.⁵¹

The OLC makes three arguments for validating a two member Board. First, the Board argues that the plain text of the statute supports a valid two-member Board if the Board had delegated all of its powers to a group of three members, and the remaining two members were part of the group of three to which the Board delegated its powers.⁵² According to the OLC Opinion, the NLRA clearly provides that two members shall constitute a quorum where the Board has delegated its powers to a group of three or more members.⁵³ Furthermore, the OLC contends that the statute ensures that a vacancy will not “impair the right of the remaining

⁴⁶ M. Edward Whelan, III, Quorum Requirements: Memorandum Opinion for the Solicitor, Nat’l Labor Relations Bd., 1 (Mar. 4, 2003), http://www.usdoj.gov/olc/2003/nlr_b_quorum_03042003.pdf (last visited Mar. 27, 2010).

⁴⁷ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 471 (D.C. Cir. 2009).

⁴⁸ Whelan, *supra* note 45.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 29 U.S.C. § 153(b).

members to exercise *all* of the powers of the Board.”⁵⁴ This vacancy provision along with the two-member quorum provision provides “that the Board could form a ‘group’ that could exercise all of the Board’s powers as long as it had a quorum of two members.”⁵⁵

Second, the OLC opinion uses *Photo-Sonics, Inc. v. NLRB* as precedent to determine that a two-member Board would be valid if it was part of a three-member panel to which the Board had delegated its powers.⁵⁶

Third, the OLC determines that the legislative history of the NLRA supports its conclusion.⁵⁷ The intent of the Taft-Hartley Amendment was to “enable the Board to handle more cases by dividing itself into panels.”⁵⁸ If the Board were to cease issuing orders, it would undermine the intent of the Taft-Hartley Act.⁵⁹ On the other hand, allowing a two-member Board to continue adjudication would sustain the Board and its work. The OLC acknowledges that this intent is not exactly on point, but the conclusion that the two-member Board is valid would at least be consistent with the intent of the Taft-Hartley amendments.⁶⁰

Therefore, although the OLC realized that its decision was at odds with dicta in a D.C. Circuit case, *Railroad Yardmasters of America v. Harris*, the OLC decided that the plain text of the NLRA along with its legislative intent and some precedent permit the conclusion that “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.”⁶¹

F. Quorums under a Five-Member Board

Although Liebman and Schaumber continued to adjudicate based on the opinion of the OLC, recent petitioners have attempted to overturn the NLRB’s rulings based, not on the merits of their cases, but rather on the invalidity of the two-member panel. The issue is one of first impression. Previously, in *Photo-Sonics, Inc. v. NLRB*, the Ninth Circuit held that, when the resignation of one panel member is effective on the day a decision is announced, the resignation did not invalidate the

⁵⁴ *Id.* (emphasis added).

⁵⁵ Whelan, *supra* note 45, at 2.

⁵⁶ *Id.* (citing 678 F.2d 121 (9th Cir. 1982)); *see also* discussion *infra* Part II.F.

⁵⁷ Whelan, *supra* note 45, at 3.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 3–4; *see infra* Part IV.B for discussion of *Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983).

decision.⁶² Furthermore, in dicta, the *Photo-Sonics* court held that “a decision by two members of the panel would still be binding.”⁶³

The case involved three supervising personnel who ran Photo-Sonics, a company manufacturing photographic equipment in California: President, John Kiel; burr bench supervisor, Robert Alonzo; and machine shop foreman, Richard Ominski.⁶⁴ These supervising personnel became apprehensive when a union began an organizing campaign to unionize Photo-Sonics’ employees.⁶⁵ The union conducted an election and lost, but the employees challenged approximately twenty ballots due to conduct of the supervising personnel.⁶⁶ For example, employees claimed that Ominski and Alonzo both threatened to “make it rough” on the employees if a union was established at Photo-Sonics.⁶⁷ Additionally, Kiel purportedly threatened to lay off people if a union were established.⁶⁸ Furthermore, approximately two to three weeks before the election, Kiel held meetings attended by employees in which he allegedly promised to provide more holidays and better benefits for employees’ families to prove to the employees that they did not need a union.⁶⁹ Finally, Marshall, one of the employees with whom Ominski had discussed the union, was fired for being “inefficient and too slow. . . .”⁷⁰ The General Counsel claimed that these reasons were pretextual, and that Photo-Sonics had fired Marshall for his connection with the union.⁷¹ Photo-Sonics argued that its supervising personnel were not aware of Marshall’s union membership and, also, that its personnel had not made any of the alleged statements.⁷²

A three-member panel heard the case, and concluded that the supervising personnel had violated Section 8(a)(1) of the NLRA for the above reasons.⁷³ But, before the decision was announced, one member of the panel resigned.⁷⁴ The “resignation became effective at the first

⁶² *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 122 (9th Cir. 1982).

⁶³ *Id.* at 122.

⁶⁴ *Photo-Sonics, Inc.*, 254 N.L.R.B. 567, 571 (1981), *enforced*, 678 F.2d 121 (9th Cir. 1982).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 579.

⁶⁹ *Id.*

⁷⁰ *Photo-Sonics, Inc.*, 254 N.L.R.B. at 580, *enforced*, 678 F.2d 121 (9th Cir. 1982).

⁷¹ *Id.*

⁷² *Id.* at 578–81.

⁷³ *Id.* at 586.

⁷⁴ *Photo-Sonics*, 678 F.2d at 122.

moment of January 14, 1981, [and therefore that member] . . . was not a member of the Board when the Board's decision issued later that day."⁷⁵

When Photo-Sonics realized the resignation became effective the day that the decision issued, Photo-Sonics appealed to the Ninth Circuit, arguing that the Board's decision was invalid because it was not made by a three-member panel.⁷⁶ The Ninth Circuit found Photo-Sonics's argument unpersuasive.⁷⁷ The Ninth Circuit cited to the NLRA Section 3(b), which states that the Board may

delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.⁷⁸

Although no court has defined "quorum" as used in the NLRA, the Ninth Circuit drew an analogy to cases interpreting the statutes which established the number of judges required to hear an appeal.⁷⁹ Federal statutes require that a panel of three judges hear appeals; however, two judges may constitute a quorum of the panel of three.⁸⁰ In this context, previous courts have defined "quorum" as the "number of the members of the court as may legally transact judicial business."⁸¹ Therefore, two members of a three-judge panel may validly render a decision.⁸² Similarly, the Ninth Circuit held that two members of a three-member Board may validly render a decision.⁸³ Moreover, the Ninth Circuit noted that, on numerous occasions, the Board has issued a decision by two members where the third judge has died or taken ill.⁸⁴ Therefore, the *Photo-Sonics* court suggested that, even if the resigning member had not participated in the decision, the decision would be valid.⁸⁵

The *Photo-Sonics* case, however, differs from the issue at hand for three reasons. First, in *Photo-Sonics*, three members actually heard the

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 123.

⁷⁸ 29 U.S.C. § 153(b).

⁷⁹ *Photo-Sonics*, 678 F.2d at 122.

⁸⁰ *Id.*

⁸¹ *Photo-Sonics*, 678 F.2d at 122 (citing *Tobin v. Ramey* 206 F.2d 505, 507 (5th Cir. 1953)).

⁸² *Photo-Sonics*, 678 F.2d at 122–23.

⁸³ *Id.* at 123.

⁸⁴ *Id.*

⁸⁵ *Id.*

case and made the decision. Currently, two members are hearing the cases and issuing decisions. Second, *Photo-Sonics*, like the statute, “answer[ed] the question of what happens when there are three members of the Board but one is absent or disqualified.”⁸⁶ Presently, there is no third member. Third, and perhaps most importantly, the Board, as a whole, retained its quorum of three. Today, the Board has only two members on the Board, and therefore does not have the required three-member quorum.

III. SPLIT OF AUTHORITY

A. Two-member NLRB may validly exercise its power under Section 3(b) of the NLRA.

Five circuits have held that decisions made by the two-member Board are valid.⁸⁷ One example is *New Process Steel, L.P. v. NLRB*.⁸⁸ In *New Process Steel*, the Seventh Circuit held that the two-member Board had authority to hear labor disputes and to issue orders.⁸⁹

New Process Steel operated five steel processing facilities; a union was certified as the exclusive bargaining agent for New Process Steel’s employees at its Indiana facility.⁹⁰ New Process Steel and the union began negotiations by initialing each contract provision that they tentatively agreed upon.⁹¹ Once the entire contract had been reviewed, the union wanted New Process Steel to sign the agreement.⁹² However, New Process Steel refused to sign the contract until the union had the employees vote for the contract.⁹³ The union reluctantly agreed and made plans for the employees to ratify the contract.⁹⁴ New Process Steel and the union never discussed any ratification procedures, so the union

⁸⁶ Posting of Richard Bales to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (December 28, 2007).

⁸⁷ See generally, *Northeastern Land Services, LTD v. NLRB*, 560 F.3d 36 (1st Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009); *Teamsters Local Union No. 523 v. NLRB*, Nos. 08-9568, 08-9577, 2009 WL 4912300 (10th Cir. Dec. 22, 2009).

⁸⁸ *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009).

⁸⁹ *Id.* at 848.

⁹⁰ *New Process Steel, LP*, 353 N.L.R.B. No. 13, 185 L.R.R.M. (BNA) 1160, at *3 (2008), *enforced by* 564 F.3d 840 (7th Cir. 2009).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *New Process Steel, LP*, 353 N.L.R.B. No. 13, 185 L.R.R.M. (BNA) 1160, at *4 (2008), *enforced by* 564 F.3d 840 (7th Cir. 2009).

used its traditional procedure.⁹⁵ The ratification process was accomplished by first voting for or against the contract.⁹⁶ If the employees voted against the contract, “but then did not vote to strike by 2/3 majority,” the contract was ratified by the union.⁹⁷

The New Process Steel employees neither voted for the contract nor voted to strike; accordingly, the union ratified the contract.⁹⁸ New Process Steel objected, contending that the contract was never ratified; therefore, the tentative contract was rendered void.⁹⁹ The union challenged New Process Steel’s contention, arguing that New Process Steel was committing an unfair labor practice.¹⁰⁰ The two-member Board heard the case and issued a decision in favor of the union.¹⁰¹ New Process Steel appealed to the Seventh Circuit, arguing that the two-member Board lacked authority to issue decisions.¹⁰²

The Seventh Circuit began its analysis by evaluating the plain meaning of the statute.¹⁰³ New Process argued that the Board had not delegated its powers to three members because the term of one of the members was about to expire.¹⁰⁴ Thus, according to New Process, this member was a “phantom member,” and the Board essentially delegated its powers to two members.¹⁰⁵ However, the Board argued that Section 3(b) provides that the Board may delegate its authority to a three-member panel, and that this panel may still conduct business with only two members.¹⁰⁶ Accordingly, the Seventh Circuit held that the plain meaning of the statute provides that “a vacancy of one member of a three member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB.”¹⁰⁷

Even though the Seventh Circuit held that the statute unambiguously provided for a valid two-member Board, the Court delved into the legislative history of the NLRA for further arguments that

⁹⁵ *Id.* at *5.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ New Process Steel, LP, 353 N.L.R.B. No. 13, 185 L.R.R.M. (BNA) 1160, at *5 (2008), *enforced by*, 564 F.3d 840 (7th Cir. 2009).

⁹⁹ *Id.* at *6.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *New Process Steel*, 564 F.3d at 845.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *New Process Steel*, 564 F.3d at 845–46.

¹⁰⁷ *Id.*

its decision was correct.¹⁰⁸ The Seventh Circuit observed that the purpose of the Taft-Hartley Amendments was two-fold: to improve quality and to improve efficiency.¹⁰⁹ Additionally, the Seventh Circuit found “no suggestion . . . [in the legislative history] that the Board is restricted from acting when its membership falls below a certain level.”¹¹⁰ Instead, if the two-member Board were held invalid, the Board’s operations would come to a halt and frustrate Congress’s goal of increasing efficiency.¹¹¹ Therefore, the Seventh Circuit upheld the validity of the two-member Board based on the plain meaning of the statute as well as its legislative history.

The Second Circuit, in *Snell Island SNF LLC v. NLRB*,¹¹² provided a different rationale for validating the two-member Board. In *Snell Island*, the Second Circuit held that the two-member Board retained its jurisdiction even though the Board had lost its quorum, and therefore the decision of the two-member Board was valid.¹¹³

Snell Island was a nursing home that provided long-term health care to elderly and disabled adults.¹¹⁴ An election was held to make the union the exclusive collective-bargaining representative of all Snell Island employees.¹¹⁵ The union won the election, and the Board certified the union.¹¹⁶ Soon after, the union requested that Snell Island recognize and bargain with the union on behalf of the employees.¹¹⁷ Snell Island refused to bargain with the union, claiming as an affirmative defense that the union’s certification was not valid.¹¹⁸ The union moved for summary judgment, and the Board granted it because Snell Island had failed to challenge the union’s certification at the prior representation hearing.¹¹⁹

Snell Island sought review of the Board’s judgment that Snell Island had violated the NLRA by not recognizing and bargaining with the unionized employees.¹²⁰ On appeal, Snell Island did not challenge

¹⁰⁸ *New Process Steel*, 564 F.3d at 846–47.

¹⁰⁹ *Id.* at 847.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009).

¹¹³ *Id.* at 410.

¹¹⁴ *Snell Island SNF LLC*, 352 N.L.R.B. No. 106, at *2, 184 L.R.R.M. (BNA) 1440 (July 18, 2008), *enforced*, 568 F.3d 410 (2d Cir. 2009).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *1.

¹¹⁹ *Id.*

¹²⁰ *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009).

the Board's decision on the merits.¹²¹ Instead, Snell Island contended that a judgment by a two-member Board violated the NLRA, and therefore the decision was invalid.¹²²

On review, the Second Circuit applied the *Chevron* doctrine to interpret the language of the NLRA.¹²³ The *Chevron* doctrine provides a two-step process for analyzing statutes that govern federal agencies.¹²⁴ The first step is to decide whether Congress has addressed the issue.¹²⁵ If the statutory text is unambiguous and speaks to the issue, then Congress has addressed the issue, and there is no need for further analysis.¹²⁶ However, if the statutory text is ambiguous, then the court must use the canons of construction and legislative history of the statute to identify Congress' intent.¹²⁷ If Congress's intent may not be determined, then the court must "defer to an agency's interpretation of the statute it administers, so long as it is reasonable."¹²⁸

Thus, in accordance with the *Chevron* doctrine, the *Snell Island* court first turned to the statutory text on point to see if it illuminated Congress's intent.¹²⁹ The court focused on Section 3(b), which states that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."¹³⁰

Although the Seventh Circuit had held that this text was sufficiently clear to answer whether a two-member Board was valid, the Second Circuit did not find that the statute was unambiguous on its face.¹³¹ The fact that there was a circuit split on the issue was itself sufficient proof

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *see also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹²⁴ *Chevron*, 467 U.S. at 842–43.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Snell Island*, 568 F.3d at 415, quoting *N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Servs. Admin. for Children & Families*, 556 F.3d 90, 97 (2d Cir. 2009), citing to *Chevron*, 467 U.S. at 842–43; *see also* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.").

¹²⁹ *Snell Island*, 568 F.3d at 423.

¹³⁰ 29 U.S.C.A. § 153(b) (2006).

¹³¹ *Snell Island*, 568 F.3d at 420.

for the *Snell Island* court to hold that the section 3(b) text was ambiguous.¹³²

In accordance with the *Chevron* doctrine, the Second Circuit next turned to the legislative history of the NLRA and to pertinent canons of construction to determine whether Congress intended for a two-member Board to retain jurisdiction.¹³³ The court first analyzed the legislative history of the NLRA as described by the parties.¹³⁴ The Board noted that, in 1947, the NLRA expanded the Board from three members to five members; this increase in membership was supposed to enable the Board to hear “twice as” many cases as it had in the past.¹³⁵ Achieving a more efficient Board was essential at the time because the Board was behind in its work, and the amendments to the NLRA put a greater burden on the Board.¹³⁶

After discussing the statute’s legislative history, the Board argued that prior to the 1947 Taft-Hartley Amendments, only two members were required for a quorum, and, “during its 12 years of administering federal labor policy, [the Board] issued hundreds of decisions with only two of its three seats filled.”¹³⁷ However, while the *Snell Island* court conceded that such history seemed to support the Board’s reading of the statute, the court held that the legislative history did not “definitively answer the precise question at issue”; that is, whether Congress would validate or invalidate the two-member Board under the current NLRA.¹³⁸

Therefore, the court deferred to the argument of the NLRB.¹³⁹ The Board, relying on the OLC opinion, had held that the statute allowed for two members to constitute a quorum for a three-member panel based on both the plain text of the statute and its legislative history. Despite its deference to the Board, the *Snell Island* court noted that the statute does not answer whether a panel retains jurisdiction when the NLRB loses its quorum; consequently, the *Snell Island* court observed that the D.C. Circuit’s opposing view is reasonable as well.¹⁴⁰ But according to the

¹³² *Id. Compare* *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009) *with* *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.D.C. 2009).

¹³³ *Snell Island*, 568 F.3d at 420.

¹³⁴ *Id.* at 417; *New Process Steel, see also L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009).

¹³⁵ *Snell Island*, 568 F.3d at 421 (citing 93 Cong. Rec. 3950, 3543 (Apr. 23, 1947)).

¹³⁶ *Id.*

¹³⁷ *Id.* at 422 (internal citation omitted).

¹³⁸ *Snell Island*, 568 F.3d at 422.

¹³⁹ *Id.* at 423.

¹⁴⁰ *Id.*

Chevron doctrine, the court must give deference to the agency's opinion if it is reasonable.¹⁴¹

Thus, the Second Circuit held that, because of the two-member quorum, the three-member "panel continued to operate in accordance with section 3(b) of the Act after one of its members ceased to serve on the Board and even though the Board itself lost a quorum."¹⁴² The Second Circuit's analysis provided a detailed and reasonable argument for the defense of the two-member Board, using the *Chevron* analysis. Moreover, the Second Circuit's decision to uphold the validity of the two-member Board "ma[de] the chance for Supreme Court review even higher" because the decision made the tally three to one in favor of upholding the two-member Board.¹⁴³

Another circuit that has held in favor of the two-member Board is the First Circuit, in *Northeastern Land Services, Ltd. v. NLRB*.¹⁴⁴ The First Circuit held that the designation of power to a three-member Board allowed for the current two-member Board to represent a quorum by the "plain text" of the statute.¹⁴⁵ Section 3(b) permits the Board to delegate its power to a three-member panel, just as the current Board did.¹⁴⁶ Additionally, the First Circuit noted that the statute plainly authorized the Board to continue adjudicating despite a vacancy.¹⁴⁷ The First Circuit observed that it was a vacancy which left the two member quorum remaining, and that the statute provides that a vacancy "shall not . . . impair the right of the remaining members to exercise all of the powers of the Board."¹⁴⁸ The First Circuit further noted that its decision was consistent with the Office of Legal Counsel opinion; the Board had relied on this opinion when deciding how to deal with the pending vacancies.¹⁴⁹ Therefore, the two-member Board had jurisdiction to hear cases and to issue decisions.

¹⁴¹ *Id.*

¹⁴² *Id.* at 424.

¹⁴³ Posting of Jeffrey M. Hirsch to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (June 17, 2009).

¹⁴⁴ *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009).

¹⁴⁵ *Id.* at 41.

¹⁴⁶ 29 U.S.C. § 153(b).

¹⁴⁷ Cite to *Northeastern Land Services*, 560 F.3d at 41.

¹⁴⁸ *Id.*; 29 U.S.C. § 153(b) (2006).

¹⁴⁹ *Northeastern*, 560 F.3d at 41.

B. Two-member NLRB lacks the power to issue decisions under Section 3(b) of the NLRA.

Only one court, the D.C. Circuit, has found that a two-member Board is invalid.¹⁵⁰ In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, the D.C. Circuit held that the current two-member Board was not “properly constituted,” and, thus, the decisions rendered by it were not valid.¹⁵¹

The case involved a company, Laurel Baye Healthcare, that provided skilled care nursing services to people in Buford, Georgia.¹⁵² Employees of Laurel Baye Healthcare elected a union, and the Board certified the union some time later.¹⁵³ Subsequently, Laurel Baye made unilateral changes to the terms and conditions of the employees’ contracts, including a new dress code, a new attendance policy, a new health insurance plan carriers and benefits, a reduction in vacation pay benefits, and a change in vacation notice requirements.¹⁵⁴ Furthermore, Laurel Baye neither recognized nor bargained with the union after the union’s certification.¹⁵⁵

The union filed unfair labor charges against Laurel Baye, and the Board ordered that Laurel Baye cease and desist such practices, and rescind the unilateral changes Laurel Baye made to the terms and conditions of employment.¹⁵⁶ Laurel Baye appealed the Board’s findings, giving two reasons why the two-member Board’s findings should be invalid: first, the Board may not delegate its power to a three member group if it knows that the group will soon only consist of two members; and, second, the Board may no longer issue decisions because it has not met the quorum number for the Board itself.¹⁵⁷ The D.C. Circuit disregarded Laurel Baye’s first argument because it found the second argument persuasive.¹⁵⁸

Instead of relying on the *Chevron* doctrine, the D.C. Circuit turned to a “cardinal principle of interpretation [which] requires a court to construe a statute ‘so that no provision is rendered inoperative or

¹⁵⁰ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009).

¹⁵¹ *Id.*

¹⁵² *Laurel Baye Healthcare of Lake Lanier, LLC*, 352 N.L.R.B. 179, 181 (2008), *vacated by*, 564 F.3d 469 (D.C. Cir. 2009).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 179.

¹⁵⁷ *Laurel Baye*, 564 F.3d at 472.

¹⁵⁸ *Id.*

superfluous, void or insignificant.”¹⁵⁹ If the two-member Board is valid, the court held, then two portions of the statute would be rendered void.¹⁶⁰ First, the requirement that the Board have a quorum of three “at all times” would be meaningless.¹⁶¹ In the current situation, the Board quorum is not met. Second, the distinction between the Board quorum and a quorum of a three-member panel would become void.¹⁶² The fact that two members constitute a quorum for any group of three “does not eliminate the requirement that a quorum of the *Board* is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two.”¹⁶³

The *Laurel Baye* court then pointed to principles of agency and corporation law to undermine the finding that the two-member Board was valid.¹⁶⁴ When a principal delegates powers to an agent, the agent’s authority ends when the principal’s powers terminate.¹⁶⁵ Similarly, when a “board’s membership falls below a quorum,” the board loses its powers.¹⁶⁶ The delegated committee does not act of its own accord; like an agent, its powers only stem from a principal.¹⁶⁷ The Board countered that the D.C. Circuit had previously allowed for other agencies to continue operating despite the agencies not meeting the minimum membership requirement.¹⁶⁸ However, the D.C. Circuit distinguished these cases because the agencies that were allowed to continue despite their lack of members were not “engaged in substantive adjudications [concerning] unfair labor practices [and] enforc[ing] individual rights....”¹⁶⁹ The same principle, the D.C. Circuit reasoned, should not be extended to agencies like the National Labor Relations Board that are involved in such substantive adjudications.¹⁷⁰

Accordingly, the *Laurel Baye* court held that “[a] three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum

¹⁵⁹ *Id.* at 472 (citing *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; see 29 U.S.C. § 153(b).

¹⁶² *Laurel Baye*, 564 F.3d at 472.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 473.

¹⁶⁵ *Id.* (referencing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006)).

¹⁶⁶ *Id.* at 473.

¹⁶⁷ *Laurel Baye*, 564 F.3d at 473.

¹⁶⁸ *Id.* at 474.

¹⁶⁹ *Id.* (citing *Yardmasters*, 721 F.2d at 1345).

¹⁷⁰ *Laurel Baye*, 564 F.3d at 474.

requirement is, ‘at all times,’ satisfied.”¹⁷¹ The D.C. Circuit stands alone in its holding, but it is important to note that the D.C. Circuit has a strong relationship with the Board. Not only does the D.C. Circuit have jurisdiction over any NLRB decision, but also “its holding generally garners far more respect than those of other circuits” on labor matters.¹⁷² Because of this strong connection with the D.C. Circuit, the decisions of the circuit courts are not treated equally.¹⁷³

However, in its conclusion, the D.C. Circuit acknowledged the inconvenience that its decision would bring to the operation of the Board and the resolution of labor disputes. In response, the D.C. Circuit offered a practical solution to the inconvenience that its holding would inevitably bring.¹⁷⁴ The D.C. Circuit suggested that, once the Board is properly constituted, the past decisions of the two-member Board should be ratified or reinstated.¹⁷⁵ While this would not completely mitigate the inconvenience of the D.C. Circuit’s holding, it would provide an efficient means to give force to the 300-plus cases rendered invalid.

IV. ANALYSIS AND PROPOSAL

A. Arguments Defending the Two-Member Board

There are four arguments for holding the two-member Board valid. The first argument is a purely instrumental one—that holding such a Board invalid would require the voiding of more than 300 Board decisions issued over the last two-plus years. This argument, though perhaps not stated so explicitly in the circuit court opinions upholding the two-member Board, may well have motivated those opinions. This is an exceptionally poor legal argument, however, for upholding the two-member Board, for two reasons. First, such instrumental concerns cannot trump the plain language of the statute which, as will be discussed in more detail in the next section, permits decisions of two members of the Board only when those two members are part of a quorum of three. Second, the instrumental concerns are not insurmountable. As discussed

¹⁷¹ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472 (D.C. Cir. 2009).

¹⁷² Posting of Jeffrey M. Hirsch to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (May 1, 2009).

¹⁷³ Posting of Jeffrey M. Hirsch to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (May 1, 2009); *see also*, 11 EMPLOYMENT COORDINATOR LABOR RELATIONS *Board Members* § 41:5 (2009).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

above, the decisions issued between January 1, 2008 and the appointment of new Board members sufficient to create a quorum of at least three may be reinstated by that three-member quorum.

The second argument for upholding the two-member Board is closely related to the instrumental argument. This second argument is that allowing the two-member Board to continue adjudication and upholding its previous decisions is arguably consistent with the legislative history of the statute.¹⁷⁶ The drafters of the Taft-Hartley Act sought to make the Board more efficient by increasing the membership of the Board from three to five.¹⁷⁷ In this way, the Board would be able to hear more cases and render more decisions in a smaller time frame. However, if the Supreme Court decides that the Board may no longer adjudicate, then the decision will halt the Board's work altogether. Any Board adjudications will have to be deferred until additional members are appointed by the President and approved by the Senate. Moreover, if the two-member Board is invalidated, one and a half years of Board decisions will be erased.¹⁷⁸ Therefore, invalidating the Board will be anything but efficient.

Additionally, the legislative history illustrates that at least one senator, Senator Joseph C. O'Mahoney, who had opposed the Taft-Hartley Act, disliked the idea of delegating the Board's powers "to less than a quorum of the Board."¹⁷⁹ Although this demonstrates that the senator opposed two members deciding cases, it also may be used to demonstrate that the statute allows for "less than a quorum of the Board" to hear cases—and this is why he adamantly opposed the Taft-Hartley Amendments.

Nonetheless, the legislative history does not clearly prove that Congress intended a two-member Board to adjudicate. Even if the Supreme Court allows the Board to continue operating, the efficiency that the Taft-Hartley Act sought will not be achieved with only two members. Even while operating, the Board has (admirably) decided to leave the particularly difficult cases for a day when the Board is fully constituted.¹⁸⁰ Thus, whether the Board is operating or not, the goal of efficiency is significantly diminished when there are only two members.

¹⁷⁶ *Snell Island*, 568 F.3d at 417; see also *New Process Steel*, 564 F.3d at 847.

¹⁷⁷ *Id.*

¹⁷⁸ David J. Murphy, *The "New" Obama National Labor Relations Board: Attack, Retreat, or Both?*, in *EMPLOYMENT LITIGATION 2009*, at 267, 263–94 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18618, 2009).

¹⁷⁹ *Id.*

¹⁸⁰ Murphy, *supra* note 27, at 270 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18618, 2009) ("As Chair Liebman and Member Schaumber have openly

Furthermore, although Senator O'Mahoney rightly expressed anxiety at the idea of delegating the Board's powers to less than a quorum of the Board, his words, like the other legislative history, fail to prove that the Board was meant to operate with two members. O'Mahoney was most likely worried about two members adjudicating cases in general, not two members constituting the entire Board. In any event, he was only one senator, and was on the losing side of the Taft-Hartley Amendments.

The third argument for holding the two-member Board valid is that the history of the NLRA itself supports a holding that a two-member Board is valid.¹⁸¹ As noted above, prior to the Taft Hartley amendments, the Board consisted of three members, two of which formed a quorum.¹⁸² In addition, the prior law had a "vacancy clause" similar to the current one, which provided that "[a] vacancy . . . shall not impair the right of the remaining members to exercise all the powers of the Board, and two members shall, at all times, constitute a quorum."¹⁸³ Because of this vacancy clause, between the years of 1935 and 1947, the Board issued hundreds of decisions with only two members.¹⁸⁴ Proponents of the two-member Board reason that, because the 1947 amendments "left undisturbed the two-member quorum requirement for panels of the Board," the Board should be allowed to adjudicate with two members as it had under the prior law.¹⁸⁵

Despite the fact that there is still a vacancy clause, this argument remains unpersuasive. Although the Board did previously render decisions with only two members, these decisions occurred before the 1947 Taft-Hartley amendments. The 1947 amendments altered the last portion of the vacancy clause, requiring three members to constitute a quorum of the Board and two members to constitute a quorum of a *panel* of the Board. Using this argument ignores the 1947 amendments. Prior to 1947, a fully constituted Board consisted of only three members, so it is not surprising that a quorum would consist of two. After 1947, however, a fully constituted Board consisted of five members. A quorum of a five-member Board normally would be three; a quorum of

discussed, they have strived to issue decisions during this time period only in areas where the cases are more factually intensive or the law is more-clearly settled, and have avoided as far as possible controversial issues.").

¹⁸¹ *Snell Island*, 568 F.3d at 421.

¹⁸² *Id.*

¹⁸³ Second Circuit Rules Two-Member NLRB Has Authority to Issue Decisions, Orders, 115 DLR A-1 (June 18, 2009).

¹⁸⁴ *Id.*

¹⁸⁵ *Snell Island*, 568 F.3d at 422.

two would be aberrational, and there is nothing in the legislative history of the Taft-Hartley amendments suggesting that Congress intended such an aberrational result.

The fourth argument for upholding the two-member Board is *Chevron* deference. The *Chevron* doctrine requires that a court first determine if Congress has expressly addressed the issue at hand.¹⁸⁶ If, after analyzing the statute, the Court finds that Congress was silent on the issue, “the question is . . . whether the agency’s answer is based on a permissible construction of the statute.”¹⁸⁷ The Court may not decide the issue if the agency’s answer is based on a reasonable interpretation of the statute.¹⁸⁸ Accordingly, the *Chevron* doctrine has been used by courts to determine that the two-member Board is invalid.¹⁸⁹ If a deciding court determines that the statute is ambiguous on whether a two-member Board may continue to issue decisions, it may simply turn to the NLRB’s position that a two-member Board is valid.¹⁹⁰

However, there are three reasons why the *Chevron* deference doctrine does not apply here. First, the OGC opinion does not constitute a decision of the administrative agency. Specifically, the *Chevron* doctrine does not apply because the Board has not spoken on the issue. In the *Snell Island* brief, the appellant contended that the Second Circuit committed grievous error by deferring, not to the Board’s interpretation, but to the OLC’s opinion.¹⁹¹ The appellant noted that:

The Board did not undertake to make, formally or otherwise, its own independent determination as to the meaning of Section 3(b). This issue was never litigated in any formal Board proceeding, nor did the Board engage in formal rulemaking. Instead, the Board sought an opinion from the OLC and the Board agreed to be “bound” by that determination. Thus, it is the opinion of the OLC, not the [B]oard, to which the Second Circuit deferred.¹⁹²

¹⁸⁶ *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁸⁷ *Chevron*, 467 U.S. at 843.

¹⁸⁸ *Id.*

¹⁸⁹ *See Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 419–20 (2d Cir. 2009).

¹⁹⁰ *Id.*

¹⁹¹ Petition for Writ of Certiorari, *Snell Island*, 2009 WL 2965322 (No. 09-328) (discussing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

¹⁹² *Id.* at *18–19.

Rather than pronouncing with definitiveness its own ruling on the issue, the Board (commendably) went on to request certiorari.¹⁹³ The Board's own reluctance to assert an opinion and stick to it demonstrates that even the Board itself has reason to doubt whether Congress implicitly delegated power to interpret this section of the statute.¹⁹⁴

Professor Ronald Turner of the University of Houston concurs, noting that "the OLC's view . . . [does not reflect] the Board's expertise, informed judgment, and articulated and persuasive reasoning and explanation."¹⁹⁵ Therefore, the OLC opinion "is not and should in no way be equated" with the opinion of the Board, i.e. the agency at issue.¹⁹⁶ Mr. Turner's argument against applying the *Chevron* doctrine stops here.¹⁹⁷

Second, the conclusion of the OGC opinion is not *reasonable* because it is inconsistent with the explicit language of the statute. *Chevron* deference applies only when there is statutory ambiguity or a gap; none exists here.¹⁹⁸

Third, *Chevron* deference does not apply when an agency is arguable expanding its jurisdiction beyond statutory boundaries. Courts should give particular scrutiny to the decisions of administrative agencies that expand the scope of agency jurisdiction.¹⁹⁹ In such cases, the *Chevron* doctrine, which the Second Circuit used to hold that the two-member Board was valid, does not apply.²⁰⁰ The *Chevron* doctrine provides for deference to an agency because it assumes that statutory ambiguity is an implied delegation of Congress to the agency "to fill in

¹⁹³ Press Release, National Labor Relations Board, Supreme Court Is Asked to Settle the Question of Two-Member Rulings by the NLRB (Sept. 29, 2009), http://www.nlr.gov/shared_files/Press%20Releases/2009/R-2704.pdf.

¹⁹⁴ Petition for Writ of Certiorari, *Snell Island*, 2009 WL 2965322 (No. 09-328) (discussing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

¹⁹⁵ Ronald Turner, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, in THE UNIVERSITY OF HOUSTON LAW CENTER PUBLIC LAW AND LEGAL THEORY SERIES NO. 18618, at 35 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507346.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See discussion *infra* Part IV.B.

¹⁹⁹ Kristine Cordier Karnezis, J.D., *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2D 25, § 5 (2005); see also *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

²⁰⁰ Posting of Jeffrey M. Hirsch to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (June 17, 2009).

the statutory gaps.”²⁰¹ However, “in extraordinary cases – such as in an agency’s interpretation of the scope of its jurisdiction – there may be reason to hesitate before concluding that Congress intended such an implicit delegation.”²⁰² In the situation at hand, the Board is defending its jurisdiction or power to hear cases.²⁰³ Although it is important for the Board to continue adjudication, it is also important for Congress to confine the Board’s powers to those given it by Congress. An interpretation of the NLRA giving the Board power even when its membership falls below the quorum is an interpretation that deserves further examination; that is, examination beyond deference to the Board’s pronouncement on the issue.

A. Arguments for Invalidating the Two-Member Board

Although the decision to invalidate the two-member Board would bring labor adjudications to a halt, there are three powerful reasons to invalidate the two-member Board. First, the two-member Board contravenes the explicit language of the statute; invalidating the two-member Board would uphold the statutory integrity of the NLRA.²⁰⁴ As the D.C. Circuit pointed out in *Laurel Baye*, permitting the two-member Board to continue would render certain provisions in Section 3 of the NLRA void.²⁰⁵ The statute specifies that three members constitute the quorum of the Board “at all times.”²⁰⁶ However, two members constitute a quorum of any group of three or more members to which the Board delegates its powers.²⁰⁷ Specifically, the drafters of the NLRA wrote that two members were a quorum “of any group designated pursuant to the first sentence hereof.”²⁰⁸ If the drafters had intended the quorum of the Board to fall below three, the statute would not have required the Board quorum to be three “at all times.”²⁰⁹ Moreover, the two-member quorum provision would not state that the quorum was of any *group* designated

²⁰¹ Karnezis, *supra* note 167, § 5; *see also* *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁰² Karnezis, *supra* note 167, § 5; *see also* *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

²⁰³ Posting of Jeffrey M. Hirsch to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (June 17, 2009).

²⁰⁴ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472–74 (D.C. Cir. 2009).

²⁰⁵ *Id.* at 472.

²⁰⁶ 29 U.S.C. 153(b).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

by the Board, instead of the Board itself.²¹⁰ Therefore, if the Supreme Court were to hold that the two-member Board is valid, these provisions would become meaningless.²¹¹ If such an interpretation would render parts of the text insignificant, then it is not a reasonable interpretation of the text. In fact, it is contrary to the plain language of the NLRA.

Second, invalidating the two-member Board would protect against abuse of the Board's power in deciding labor disputes and individual rights. Currently, the fate of all labor disputes rests in the hands of two Board members. Congress created the NLRA because labor-employer disputes threatened to bring the nation's commercial activity to a halt.²¹² Congress then established the Board with certain requirements to ensure that proper authorities handled these disputes. Although the statute does allow for a two-member quorum of a group designated by the Board to adjudicate, the Act was not intended to allow for a two-member Board, as a whole, to adjudicate *all* cases.²¹³ Such a situation may lead to abuses in power that the D.C. Circuit cautioned against in *Railroad Yardmasters of America v. Harris*.²¹⁴

In *Yardmasters*, the D.C. Circuit held that "a single member of the National Mediation Board ["NMB"] may act for the Board pursuant to a validly issued delegation order that is narrowly tailored to prevent the temporary occurrence of two vacancies from completely disabling the Board."²¹⁵ The statute establishing the NMB required that "[t]wo of the members in office shall constitute a quorum for the transaction of the business of the Board."²¹⁶ During the time that the NMB consisted of one member, a representation dispute arose between two unions vying for representation of employees at the Union Pacific Railroad Company.²¹⁷ The Railroad Yardmasters of America (RYA) had represented the Company's employees from 1935 to 1982.²¹⁸ The Yardmasters Steering Committee (YSC) filed an application with the NMB to decide whether the Yardmaster employees wished to have YSC

²¹⁰ *Id.*; see also *Laurel Baye*, 564 F.3d at 472–73 ("Indeed, if congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention").

²¹¹ *Laurel Baye*, 564 F.3d at 472–73.

²¹² NLRA, THE FIRST SIXTY YEARS (1995), available at http://www.nlr.gov/publications/history/thhe_first_60_years.aspx.

²¹³ 29 U.S.C.A. § 153(b).

²¹⁴ *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983).

²¹⁵ *Id.* at 1344.

²¹⁶ *Id.* (citing 45 U.S.C. § 154 (1976)).

²¹⁷ *Id.* at 1336.

²¹⁸ *Yardmasters*, 721 F.2d at 1336.

replace RYA.²¹⁹ The unions held the elections by secret ballot.²²⁰ However, before the ballots were counted, RYA filed letters of protest with the Board, claiming that YSC had interfered with RYA's election campaign and that the election failed to comply with requirements.²²¹ The protests were denied by the one-member NMB, and RYA appealed the decision, contending that one member did not constitute a valid quorum, and that the decision therefore was invalid.²²²

The majority of the D.C. Circuit upheld the one-member NMB. However, the dissent cautioned against the majority holding, noting that enabling the Board to keep conducting business when its membership fell below the quorum could lead to an abuse of power.²²³ The majority, addressing this argument, noted that such an abuse of power was not possible because the NMB was not engaged in "substantive adjudications."²²⁴ The responsibilities of the NMB were to mediate contract disputes, to resolve representation disputes, and to administer arrangements for arbitrating disputes.²²⁵ So, unlike the NLRB, the NMB "does not adjudicate unfair labor practices or seek to enforce individual rights under the Act."²²⁶ When a Board has the power to decide individual rights and labor disputes, the risk of abuse of power is great, and should be guarded against no matter how inconvenient the result.

Finally, holding the two-member Board invalid may provide incentive for new members of the Board to be appointed and confirmed. If the operations of the Board come to a "grinding halt" as feared, it may be the necessary impetus for President Obama and Congress to agree on new members. Once new members are agreed upon, the Board may continue to adjudicate without apprehension that its decisions will be invalidated for lack of a quorum.

C. Proposal

The main problem with invalidating the two-member Board is that the decisions of labor disputes would temporarily come to a halt. Although this would be "inconvenient and unfortunate," a court should not circumvent a statutory framework in order to avoid such

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1337.

²²³ *Yardmasters*, 721 F.2d at 1347 (Wald, J., dissenting).

²²⁴ *Yardmasters*, 721 F.2d at 1345.

²²⁵ *Id.* at 1333.

²²⁶ *Id.*

inconvenience.²²⁷ The function of a court is to “interpret the statutory scheme as it exists, not as . . . [it] wish[es] it to be.”²²⁸

As the D.C. Circuit suggested, the answer to this may be to have new members ratify past decisions of the two-member Board. Former Board Chairman Robert Battista explained this suggestion, surmising that the court was simply inviting “[t]he new member[s] . . . to go through those cases [decided by a two-member Board] and see if he [or they] agree[].”²²⁹ Although this suggestion does not completely eliminate the inconvenience of having an invalid Board, it does mitigate some of the problems associated with having an invalid Board. Having one of the new members review the decisions would save time and still allow the statute to remain intact.

V. CONCLUSION

The two-member Board has wreaked havoc on the stability of labor law. With two members constituting the entire Board, the decisions of more than 300 cases are suspect. While five circuits have actually upheld the two-member Board and its decisions,²³⁰ the D.C. Circuit has struck down the 300 cases and enjoined the Board from continuing to adjudicate.²³¹ Although the two-member Board continues to adjudicate, every step is now cast in legal doubt; accordingly, the Board has petitioned the Supreme Court to review the issue.²³² The Supreme Court has granted review.²³³

While the ultimate decision will be up to the Supreme Court, the above analysis demonstrates that invalidating the two-member Board garners the most legal support. Nonetheless, invalidating the two-member Board will bring the work of the Board to a temporary halt.

²²⁷ *Yardmasters*, 721 F.2d at 1347.

²²⁸ *Laurel Baye*, 564 F.3d at 476.

²²⁹ *Courts Mixed on NLRB Makeup*, LOS ANGELES TIMES, May 2, 2009, at 2, available at 2009 WLNR 8332084.

²³⁰ See generally, *Northeastern Land Services, LTD v. NLRB*, 560 F.3d 36 (1st Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009); *Teamsters Local Union No. 523 v. NLRB*, Nos. 08-9568, 08-9577, 2009 WL 4912300 (10th Cir. Dec. 22, 2009).

²³¹ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

²³² Press Release, National Labor Relations Board, Supreme Court Is Asked to Settle the Question of Two-Member Rulings by the NLRB (Sept. 29, 2009), http://www.nlr.gov/shared_files/Press%20Releases/2009/R-2704.pdf.

²³³ 2009 Term Court Orders, 11/02/09 Order List, <http://www.supremecourt.us/orders/courtorders/110209zor.pdf>.

While this scenario is undesirable, it is also undesirable to attach power to the Board which is not supported by statute. To mitigate the inconvenience of invalidating the two-member Board, the D.C. Circuit proposed that the new members should review the cases decided by the two-member Board in order to validate them. While this process is indeed cumbersome, it seems the most practical solution to the situation at hand.